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NO. 94-1278

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

F. SCHUMACHER & CO.,
Petitioner,

v.

ALVORD-POLK, INC., et al.
Respondents.

Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
COUNTERSTATEMENT OF THE CASE	1
Factual Background	2
Court of Appeals Decision	6
SUMMARY OF ARGUMENT	8
ARGUMENT REASONS WHY THE WRIT OF CERTIORARI SHOULD NOT ISSUE	9
I. There is No Conflict Among The Circuits As To How Evidence of Pretextual Behavior By The Manufacturer Should Be Considered In A Sherman Section 1 Case	9
II. The Court Below Correctly Followed *Monsanto*	14
III. Petitioner's Remaining Arguments Favoring Certiorari Are Meritless	17
CONCLUSION	18

TABLE OF AUTHORITIES

PAGE

Cases

Boczar v. Manatee Hospitals & Health Systems, Inc., 993 F.2d 1514 (11th Cir. 1993) 13

Bolt v. Halifax Hospital Medical Center, 891 F.2d 810 (11th Cir.), *cert. denied*, 495 U.S. 924 (1990) 13

Bruce Drug, Inc. v. Hollister, Inc., 688 F.2d 853 (1st Cir. 1982) 11

Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962) 7

DeLong Equipment v. Washington Mills Electro Minerals Corp., 990 F.2d 1186 (11th Cir.), *cert. denied*, 114 S. Ct. 604 (U.S. 1993) . . . 13

Dimidowich v. Bell & Howell, 803 F.2d 1473 (9th Cir. 1986), *modified*, 810 F.2d 1517 (9th Cir. 1987) 12

Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. ___, 119 L. Ed. 2d 265 (1992) 17

Garment District, Inc. v. Belk Stores Services, Inc., 799 F.2d 905 (4th Cir. 1986), *cert. denied*, 486 U.S. 1005 (1988) 12

PAGE

H.L. Hayden Co. v. Siemens Medical Systems, Inc., 879 F.2d 1005 (2d Cir. 1989) 11

H.L. Moore Drug Exchange v. Eli Lilly & Co., 662 F.2d 935 (2d Cir 1981), *cert. denied*, 459 U.S. 880 (1982) 11

Lamb's Patio Theatre, Inc. v. Universal Film Exchanges, Inc., 582 F.2d 1068 (7th Cir. 1978) 11

Lovett v. General Motors Corp., 998 F.2d 575 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 1058 (1994) 12

Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984) . . . . . *passim*

Venture Technology, Inc. v. National Fuel Gas Co., 685 F.2d 41 (2d Cir.), *cert. denied*, 459 U.S. 1007 (1982) 11

Respondents[1] respectfully file this brief to set forth reasons why the petition for a writ of certiorari should not issue pursuant to Supreme Court Rule 10.

COUNTERSTATEMENT OF THE CASE

This antitrust action was brought by ten 800-number wallpaper dealers (respondents herein) against an influential wallpaper manufacturer, petitioner F. Schumacher & Co. ("FSC"), and a retailers' trade association, the National Decorating Products Association, Inc. ("NDPA").[2] Respondents allege that these entities conspired to force the 800-number dealers out of business.[3] At the close of fact discovery, FSC and NDPA obtained summary judgment in the district court. This grant of summary judgment was initially affirmed by the Third Circuit Court of Appeals,

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[1]Pursuant to Supreme Court Rule 29.1, respondent corporations state that they have no corporate parents or subsidiaries, with the exception of respondent American Blind Factory, Inc., which is a subsidiary of Color Tile Corporation.

[2] FSC's petition describes the NDPA as "nominally a respondent in this Court." Petition, p. 2, n.1. However, the NDPA subsequently filed its own certiorari petition (to which a separate response will be filed). Thus, in this brief, the term "respondents" refers only to the plaintiffs below.

[3]Count I of respondents' amended complaint alleges that NDPA conducted a systematic campaign to coerce wallcovering manufacturers to refrain from dealing with 800-number dealers in violation of Section I of the Sherman Act. CA App. 103-107. Count II alleges that FSC, in response to NDPA coercion and in furtherance of NDPA's objectives, imposed restraints that had the purpose and effect of eliminating 800-number dealers as competitors of NDPA showroom dealers. CA App. 108.

App., A55-A111, but was subsequently reversed by that court on panel rehearing as to Counts I and II of respondents' amended complaint, App., A1-A52. FSC's petition for rehearing en banc was denied. App., A158-A159. FSC's petition for writ of certiorari only addresses Count II.

As set forth in more detail below, the petition commits three main errors: (1) it sets forth only those facts that favor FSC, while completely ignoring the facts favorable to respondents; (2) it attempts to manufacture a non-existent conflict among circuit court decisions concerning the inferences that may be drawn regarding the existence of a conspiracy from circumstantial evidence of pretext; and (3) it incorrectly hypothesizes a conflict between the Third Circuit's decision below and this Court's analysis of Section 1 in *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984).

Factual Background. FSC's statement of the facts (petition at 3-5) omits critical facts demonstrating that NDPA pressured FSC to eliminate 800-number dealers as competitors of the retailers, and that FSC capitulated to such pressure. The Court of Appeals held that "a rational jury could find that NDPA . . . acting through its officers, threatened a retailers' boycott of manufacturers and thus could [be] h[e]ld . . . liable for a section 1 violation." App., A28-A29. This fact is of great importance because it provides the framework for FSC's conspiratorial conduct and affects how the evidence of such conduct is viewed under

Monsanto.[4] Contrary to FSC's recitation of the facts, FSC's conduct was far from unilateral.

The Court of Appeals' opinion recites the relevant facts concerning both NDPA and FSC. *See* Section II. A.-D., App., A10-A17. The following brief outline of the facts highlights key points that were omitted from FSC's petition.

In 1988, storefront retailers began clamoring for manufacturers to take action against 800-number dealers, who generally sold wallcovering products at substantially discounted prices.[5] CA App. 200-201. In order to focus and channel these demands, NDPA filled its publications with editorials, articles and letters maligning 800-number dealers, urging manufacturers to take steps to interfere with the business of 800-number dealers, and urging retailers to stop

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[4]As Judge Roth stated in her dissent to the initial Third Circuit opinion which affirmed summary judgment in favor of FSC and NDPA (the "1993 Opinion"), "the implication of treating the conspiracy alleged in this case as such a hybrid [where a manufacturer entered the scheme only as a result of substantial dealer coercion to do so, it is considered a hybrid horizontal/vertical conspiracy] is that the assumptions underlying *Monsanto's* requirements for evidence that excludes the possibility of independent manufacturer action apply with much less force." App., A108.

[5]In fact, NDPA had been campaigning against 800-number dealers well before 1988. CA App. 523, 693. In 1985 the Federal Trade Commission issued a complaint against the NDPA for the same activity complained of here, attempting to drive 800-number dealers out of the wallcovering business. App., A11; CA App. 410. In 1986, the NDPA entered into a consent order with the FTC whereby the NDPA agreed that it would not advocate, suggest, advise or recommend that any of its members refuse to deal with any sellers to attempt to affect prices, terms or conditions of sale or distribution methods. CA App. 411-413.

doing business with those manufacturers that failed to do so. CA App. 468, 479, 485, 490-92, 495, 756-59, 784, 837-38. Trade association members also wrote to manufacturers and urged them to take action against 800-number dealers. CA App. 517, 519, 523, 524, 526, 545, 546, 550, 554, 558.

Further, NDPA President John Wells, in his role as "Retailer Spokesman," spoke at an NDPA convention and told retailers to refrain from purchasing from manufacturers who did not support the NDPA against 800-number dealers. CA App. 167, 440. NDPA chief executive Robert Petit spoke to manufacturers and urged them to take steps to eliminate 800-number dealers. CA App. 185, 190-98, 201-07, 212-29, 407, 416-19, 693-99, 700. NDPA President Clyde Morgan reported to the NDPA Board of Directors with respect to a meeting that he had with a group of manufacturers who were "leaders of the wallpaper industry" in which he urged them to take action against 800-number dealers. CA App. 177-184, 1091.

FSC reacted to this pressure on July 31, 1988 by adopting a seven (7%) percent drop shipment surcharge designed to eliminate respondents' profits. CA App. 298-299. Indeed, a draft of a press release prepared by FSC admitted that the surcharge was adopted "*[i]n direct response to [storefront] retailer requests*. . . " to "protect them from sales piracy." CA App. 298-299 (emphasis supplied). The final version of this press release deleted this bit of candor, and stated instead that the surcharge was intended to "insure that our consumers receive the best possible service . . ." CA App. 486. FSC's management committee minutes, however, confirm that the true objective of the surcharge was "to make statement to industry that we are trying to help them." CA App. 290.

Another purported reason for the drop shipment surcharge was to reimburse FSC for its added costs in making drop shipments. However, no calculation was ever made to determine the amount, if any, of additional costs incurred by FSC in handling drop shipments. CA App. 148-151, 685-686. Indeed, another manufacturer stated that drop shipments do not result in any increase in handling costs. CA. App. 622.

Even after the drop shipment charge was instituted, NDPA pressure on FSC continued. FSC's president Mike Landau reported to FSC's Management Committee that he had been told at NDPA's Western meeting that while the "surcharge [was a] good first step . . . [it was] necessary to take other measures." CA App. 304. Thereafter, following additional retailer pressure,[6] FSC formulated a new strategy. CA App. 309. On January 25, 1990, FSC adopted a so-called "local trading area" policy, whereby 800-number dealers were prohibited from selling FSC products outside their local area. CA App. 627, 640, 693-699.

The NDPA quickly confirmed that FSC's local trading area restraint constituted an appropriate response to its demands for action against 800-number dealers. CA App. 376-382, 479-482, 492. The NDPA's chief executive officer wrote to the NDPA board of directors heralding FSC's restraint as "a major step forward in *our battle* against the 800 number operators." CA App. 693 (emphasis supplied). He also wrote to FSC's president, expressing "[o]n behalf of

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[6]For instance, a letter from one storefront retailer stated clearly: "We will continue to support those companies that support us . . ." CA App. 524.

the members of our decorating products associations . . . our appreciation for your actions." CA App. 700.

It is clear from a recitation of *all* the relevant facts that there is extensive evidence from which a reasonable jury could infer that FSC's conduct was not unilateral. The evidence supports the inference that the NDPA demanded action, and that FSC capitulated to these demands and agreed to eliminate the 800-number dealers.

Court of Appeals Decision. FSC mischaracterized the Court of Appeals' decision by stating that the court created a new standard for determining the existence of a conspiracy when pretext is present. FSC asserts that the court held that if evidence of pretext exists, then a conspiracy will also, necessarily, be found to exist. Petition at 10. The Court of Appeals did not so hold.

Indeed, there was no reason for the court to make such a holding because the evidence in the case provides independent direct evidence of a conspiracy. Thus, it was unnecessary for the court to rely solely on evidence of pretext to infer the existence of a conspiracy. The evidence of pretext merely serves, as the court stated, to "*support* an inference that it acted as part of a conspiracy . . ." App., A32 (emphasis supplied).

FSC glosses over this distinction between *supporting an inference* and *creating an inference* by asserting that the question presented is "whether evidence from which a jury could infer that a manufacturer's publicly stated reason for a vertical restraint was pretextual is sufficient to permit a jury also to infer that the manufacturer conspired with its complaining dealers to adopt the restraint." Petition at i.

Judge Lewis's opinion on rehearing in the court below, with its lengthy recitation and analysis of the facts of the case, App., A10-A17, shows that the court undertook a complete analysis of the evidence in determining that a jury might well infer from *all* of the evidence that a conspiracy existed between FSC and NDPA.[7]

With respect to Count I, the majority opinion held that reasonable jurors could find that the NDPA threatened a retailers' boycott of manufacturers such as FSC. App., A28. Having made this threshold determination, the court then analyzed respondents' evidence against FSC on Count II in the context of its previous finding that a jury could find that storefront retailers, acting through the NDPA, conspired to pressure manufacturers to eliminate 800-number dealers from the marketplace. App., A33-34.

For instance, the court's opinion points out that FSC's drop shipment surcharge was designed to be a "statement" that FSC was trying to help storefront retailers and was adopted "*in direct response to [such] retailer requests.*" App., A32 (emphasis supplied). The court also noted that FSC adopted the surcharge without even attempting to determine whether it would be sufficient to permit it to recoup increased costs associated with drop shipments. App., A33. The court concluded that this evidence would permit reasonable jurors to find that FSC had "agreed with others to

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[7]This Court has ruled that a plaintiff's evidence of conspiracy should be viewed as a whole and should not be compartmentalized. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962) ("plaintiffs should be given the full benefit of their proof").

impose the surcharge *whether it made economic sense or not.*" App., A33 (emphasis supplied).[8]

In sum, the court clearly examined the evidence not only in terms of pretext, but also in terms of whether the evidence, viewed as a whole, could lead a reasonable jury to infer that a conspiracy existed between NDPA and FSC.

SUMMARY OF ARGUMENT

FSC's petition for writ of certiorari should be denied. The Third Circuit Court of Appeals' decision (on panel rehearing) is not in conflict with decisions in five other circuits. The court below did not hold, contrary to FSC's assertion, that if a jury can find that pretext is present it can also infer, based solely on that evidence, the existence of a conspiracy. The court considered extensive evidence adduced by plaintiffs that supports an inference that NDPA demanded that action be taken against 800-number dealers and that FSC capitulated to their demands, thus forming a conspiracy between the two parties. Further, the Third Circuit's decision is not in conflict with this Court's holding in *Monsanto*. Rather, the Third Circuit correctly interpreted and applied *Monsanto* to this case.

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[8]Judge Roth's dissent from the Court of Appeals' 1993 Opinion also makes it clear that there is enough evidence of a conspiracy between NDPA and FSC to go to the jury. Her decision was based in part on her finding that there was sufficient evidence to go to the jury regarding NDPA's alleged anticompetitive activities (Count I) and the effect the hybrid horizontal/vertical conspiracy has on the plaintiff's burden under *Monsanto*. *See* footnote 4 above. Further, Judge Roth found evidence of coercion and of pretext. App., A106-A111.

ARGUMENT

REASONS WHY THE WRIT OF CERTIORARI SHOULD NOT ISSUE

I. There Is No Conflict Among The Circuits As To How Evidence Of Pretextual Behavior By The Manufacturer Should Be Considered In A Sherman Section One Case.

Contrary to FSC's petition, there is no conflict among the circuits. In order to fashion a putative conflict, FSC improperly ignores record evidence and distorts the holding of the court below. FSC asserts that the court below held that evidence of pretext alone is sufficient to support a finding of conspiracy consistent with *Monsanto*,[9] and that this supposed holding conflicts with decisions of five other circuits. Petition at 9-12.

Underlying FSC's argument is a fallacious view of the Third Circuit's evaluation of the evidence both of pretext and, more generally, of conspiracy. FSC misstates the matter, claiming that the court ruled that evidence of pretext alone will support an inference of antitrust conspiracy:

> The Third Circuit's holding that evidence of alleged pretext was sufficient to exclude the possibility of independent action conflicts with decisions by the First, Second, Fourth, Seventh and Eighth Circuits.

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[9]The *Monsanto* case instructs that "there must be evidence that *tends* to exclude the possibility of independent action by the manufacturer and distributor." 465 U.S. at 768 (emphasis supplied).

Petition at 10.

That is incorrect. The Court of Appeals carefully analyzed the evidence of concerted action, including extensive evidence of the pressure the NDPA exerted upon FSC and FSC's conduct taken, by its own admission, in direct response to that pressure. The fact that the court determined that a jury could infer that FSC both advanced pretextual reasons for its policies and acted in concert, App., A34, does not constitute a holding that evidence of pretext alone will create an inference of antitrust conspiracy.

For example, the court's summary of the evidence adduced by respondents regarding FSC's surcharge specifically mentions both the instances of pretext and the retailer pressure on FSC:

> [V]iewing this evidence *in conjunction with the press releases and the retailer pressure on FSC*, it is not an implausible conclusion that FSC may have imposed the surcharge without first undertaking mathematical calculations because it had agreed with others to impose the surcharge whether it made economic sense or not.

App., A33-34 (emphasis supplied). This paragraph alone makes it completely clear that the Court of Appeals was relying on more than pretext evidence when it determined that the summary judgment in favor of FSC on Count II should be reversed.

As the Court of Appeals found, plaintiffs presented (1) admissible evidence of concerted action; and (2) evidence that

tended to exclude the possibility of independent action by FSC.

FSC nevertheless contends that the Third Circuit's holding, as FSC mischaracterizes it, conflicts with decisions by the First, Second, Fourth, Seventh and Eighth Circuits. In support of this proposition, FSC cites four pre-*Monsanto* decisions which, upon analysis, are not inconsistent with the case at bar. *Bruce Drug, Inc. v. Hollister, Inc.*, 688 F.2d 853, 857 (1st Cir. 1982), held that there was no evidence of concerted action in the record, and that a supposed business pretext (which the court of appeals did not find pretextual in any event) did not, by itself, prove a conspiracy. That holding is consistent with both *Monsanto* and the decision below. *Venture Technology, Inc. v. National Fuel Gas Co.*, 685 F.2d 41, 47 (2d Cir.), *cert. denied*, 459 U.S. 1007 (1982); *H.L. Moore Drug Exchange v. Eli Lilly & Co.*, 662 F.2d 935, 943 (2d Cir 1981), *cert. denied*, 459 U.S. 880 (1982); and *Lamb's Patio Theatre, Inc. v. Universal Film Exchanges, Inc.*, 582 F.2d 1068, 1070 (7th Cir. 1978), are to the same effect, each holding that a pretextual reason is not, *in and of itself*, proof of conspiracy.

Nor do the post-*Monsanto* decisions cited by FSC pose a conflict requiring that certiorari be granted in this case. The Second Circuit's decision in *H.L. Hayden Co. v. Siemens Medical Systems, Inc.*, 879 F.2d 1005 (2d Cir. 1989), contained the same conclusion as its earlier holdings in *Venture Technology* and *H.L. Moore*: "[T]he mere fact that a business reason advanced by a defendant for its cut-off of a customer is undermined does not, *by itself*, justify the inference that the conduct was therefore the result of a conspiracy." 879 F.2d at 1014. *Hayden* does not hold that such evidence may not be considered; it holds only that,

standing alone, such evidence cannot create an inference of conspiracy.

In the Fourth Circuit case, *Garment District, Inc. v. Belk Stores Services, Inc.*, 799 F.2d 905 (4th Cir. 1986), *cert. denied*, 486 U.S. 1005 (1988), the court determined, we submit erroneously, that the true reasons behind the pretextual reasons given for the termination of a retailer were legitimate and thus could not be used to infer the existence of a conspiracy.

FSC relies most heavily on *Lovett v. General Motors Corp.*, 998 F.2d 575 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 1058 (1994). In *Lovett*, unlike in this case, there was no evidence that the defendant, in deciding to cut back the plaintiff's allocation of automobiles, had capitulated to pressure from other automobile dealers. Indeed, there was substantial evidence that GM refused to discuss the dealers' complaints, 998 F.2d at 579-80, and that the dealers were unaware of GM's decision once it was made. *Id.* at 580. Further, there was no evidence that the dealers threatened to terminate their dealerships with GM to coerce GM's actions. *Id.* In short, unlike this case, there was no evidence that GM acted *in response* to dealer pressure. In contrast, FSC has admitted in an internal document that it acted "in direct response to retailer requests . . ." CA App. 298-299.

Other decisions cited by FSC in its effort to create a "conflict" among the circuits do not hold that evidence of pretext alone is sufficient to infer a conspiracy. For instance, in *Dimidowich v. Bell & Howell*, 803 F.2d 1473 (9th Cir. 1986), *modified*, 810 F.2d 1517 (9th Cir. 1987), a refusal to deal case that was decided under California state law, the Court of Appeals examined evidence of pretext *and* separate

evidence tending to support the inference of a conspiracy. The non-pretext evidence of conspiracy included evidence that a proposal for a concerted refusal to deal had been made, and evidence that the two parties to the alleged conspiracy also agreed to "divide the market," and not seek service work in each other's territory. The court clearly did not rely solely on one incident of pretext in determining that the plaintiff had presented evidence tending to support an inference of concerted action.

Similarly, in *Boczar v. Manatee Hospitals & Health Systems, Inc.*, 993 F.2d 1514 (11th Cir. 1993), the Eleventh Circuit separately analyzed evidence of an economic motive for the alleged conspiracy, and evidence tending to exclude the possibility of independent action. In *Boczar*, a physician brought suit against a hospital and several staff physicians for conspiracy to restrain trade in violation of Section 1 of the Sherman Act after her staff privileges at the hospital were suspended. The court stated that, based on the evidence of both concerted action and pretext, "the jury may have properly inferred an unlawful conspiracy." *Id.* at 1517-1519.[10]

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[10]The Eleventh Circuit's decisions in *DeLong Equipment v. Washington Mills Electro Minerals Corp.*, 990 F.2d 1186 (11th Cir.), *cert. denied*, 114 S. Ct. 604 (U.S. 1993), and *Bolt v. Halifax Hospital Medical Center*, 891 F.2d 810 (11th Cir.), *cert. denied*, 495 U.S. 924 (1990), also do not hold that evidence of pretext alone will support an inference of a conspiracy. For instance, in *Bolt*, the Court of Appeals specifically determined that when relying on evidence of circumstantial evidence of a conspiracy, a plaintiff must show both a nonlegitimate motive for entering into the conspiracy *and* must adduce evidence tending to exclude the possibility that the alleged co-conspirators acted independently. *Id.* at 819.

FSC has completely misstated the holdings of these Ninth and Eleventh Circuit cases to bolster its argument that a split in the circuits exists on this issue. Clearly, none of these courts, including the Third Circuit in this case, has held that evidence of pretext, standing alone, will support an inference of the existence of a conspiracy. In fact, a review of the above-cited decisions makes it clear that each of the circuits represented has determined that while evidence of pretext may be probative of a Section 1 conspiracy, it will not, standing alone, create an inference that a conspiracy exists.

It is clear that FSC has mischaracterized the decision and reasoning of the Court of Appeals in this case in an attempt to generate a "conflict" with the above decisions where none exists. For these reasons, FSC's first ground for seeking a writ of certiorari must fail.

II. The Court Below Correctly Followed *Monsanto*.

FSC is equally wrong in asserting that certiorari should be granted because the decision of the Court of Appeals in this case is "at war" with the statutory requirement of concerted action in Section 1 of the Sherman Act, and is contrary to this Court's interpretation of that statute in *Monsanto*.

FSC bases its argument on a mischaracterization of the Third Circuit's holding. The Third Circuit Court of Appeals *did not* hold that evidence of pretext, standing alone, will permit a jury to infer the existence of a conspiracy. That said, the Court of Appeals decision in this case is completely consistent with this Court's holding in *Monsanto*.

In *Monsanto*, this Court stated that there can be no inference of concerted action on the basis of complaints alone; rather, there must be "something more" than mere complaints. 465 U.S. at 764. In *Monsanto*, this Court held that the plaintiff adduced sufficient evidence for the jury to have concluded that Monsanto and some of its distributors were parties to a conspiracy. For instance, there was evidence of an agreement to maintain prices and circumstantial evidence that linked the termination of the plaintiff to that agreement.[11]

Monsanto's requirement that a plaintiff adduce "something more" than customer complaints, and that the evidence should tend to prove that the manufacturer had a commitment to a common scheme, is met in this case. As noted in the Third Circuit's opinion, respondents adduced strong evidence of coercion by the NDPA, including threatened boycotts. App., A28. There is evidence that FSC acted in direct response to this coercion in instituting the surcharge on drop shipments. App., A32. There is evidence that FSC changed its previous course of conduct in attempting to eliminate the 800-number dealers after it had

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[11] In *Monsanto*, this Court determined that the case properly went to the jury despite strong evidence from the manufacturer that no conspiracy existed: "[W]e cannot say that the courts below erred in finding that [plaintiff] produced substantial evidence of the concerted action required by §1 of the Sherman Act, and that -- despite the sharp conflict in evidence -- the case properly was submitted to the jury." 465 U.S. at 468, n.14.

sold to them for years.[12] CA App. 624. Further, there is evidence that FSC acted contrary to its own economic interests in instituting a seven percent surcharge without conducting any economic analysis to determine the amount of surcharge required to help them recoup the alleged "additional costs" of drop shipments. App., A33. There was additional evidence that NDPA pressure on FSC continued even after the surcharge was implemented and, in response, FSC adopted a so-called "local trading area" policy, whereby 800-number dealers were prohibited from selling FSC products outside their local area. App., A15-16.[13] Finally there was extensive evidence that the NDPA made it clear that it believed FSC's actions were an appropriate response to its demands for action against 800-number dealers. App., A16.

FSC's analysis fails to note that, unlike *Monsanto*, which was decided on a full trial record, this case was decided on a motion for summary judgement. In that regard, the recent teachings of this Court in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. ___, 119 L. Ed. 2d 265 (1992), are significant. In *Kodak*, this Court stated that antitrust claims should be resolved on a "case-by-case basis, focusing on the 'particular facts disclosed by the record'"

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[12]In 1989, FSC's corporate vice president told an audience of retailers that sales to 800-number dealers made up 20% of the wallcovering business's total sales. CA App. 624.

[13]The evidence that FSC capitulated to NDPA pressure, and joined forces with NDPA to eliminate 800-number dealers, is carefully documented in the minutes of FSC's management committee. CA App. 290, 304, 309. Thus, the jury will be able to decide FSC's complicity in the alleged conspiracy through a well-documented record of FSC's internal deliberations.

504 U.S. at ___, 119 L. Ed. 2d at 284 (citations omitted). Further, this Court held that the nonmoving party's inferences need only be "reasonable" in order to reach the jury. 504 U.S. at ___, 119 L. Ed. 2d at 285. In this case, it is clear that respondents' inferences of a conspiracy between FSC and NDPA are more than merely "reasonable," they are compelling.

Thus, the Third Circuit's opinion in this case readily conforms to the substantive and procedural framework set down by this Court in *Monsanto* and *Kodak*.

III. Petitioner's Remaining Arguments Favoring Certiorari Are Meritless.

FSC argues that this case provides an ideal context for this Court's review because the case is devoid of factual dispute on any dispositive issue and because the judgment below turns on the legal standard employed by the Third Circuit. Petition at 14-15.

That is hardly the case. The record is replete with evidence that NDPA pressured FSC and other manufacturers to eliminate 800-number dealers, that FSC capitulated to that pressure, and that FSC joined NDPA's "battle against 800 number operators" by imposing its drop shipment surcharge and local trading area policy. In the absence of an admission by FSC that its conduct constituted a conspiracy in unreasonable restraint of trade, it remains a disputed issue of fact to be resolved by the jury. Thus, FSC's assertion that the record is devoid of factual disputes is simply untrue.

FSC's final argument is that the split in circuits "has disruptive economic and jurisprudential ramifications."

Petition at 15. As was shown above, the "split" in the circuits was fabricated by FSC for the purposes of its petition. Thus, for that reason also, FSC's policy arguments must fail.

CONCLUSION

For all of these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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